Supreme Court, U.S.
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No. 96-103

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1995

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LARRY EUGENE HOOD . . . . . .Petitioner

v.

COMMONWEALTH OF KENTUCKY . . . Respondent

◆

On Petition For Writ Of Certiorari
To The Court Of Appeals Of Kentucky

◆

RESPONDENT'S BRIEF IN OPPOSITION

◆

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12 pp

QUESTION PRESENTED FOR REVIEW

When the Court of Appeals of Kentucky held that Kentucky statutes allow a county police officer to make an arrest in an adjoining county, did it render a final order deciding a federal question in a way that conflicts with applicable decisions of this Court?

TABLE OF CONTENTS

QUESTION PRESENTED FOR REVIEW i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE 1

REASONS FOR DENYING THE WRIT 4

THE KENTUCKY COURT OF APPEALS' INTERLOCUTORY OPINION DID NOT DECIDE A FEDERAL QUESTION IN A WAY THAT CONFLICTS WITH APPLICABLE DECISIONS OF THIS COURT.

1. The state court has not ruled on the issue presented to this court by Petitioner. 4

2. The opinion by the Kentucky Court of Appeals merely interpreted state statutes and did not involve a federal question. 6

3. The state court's interlocutory opinion is not a final order. 7

CONCLUSION 8

TABLE OF AUTHORITIES

Page

Cases:

Churchwell v. Commonwealth, 843 S.W.2d 336 (1993) 5

Illinois v. Gates, 462 U.S. 213, 103 S. Ct. 2317, 76 L.Ed.2d 527 (1983), reh. Den. 463 U.S. 1237, 104 S. Ct. 33, 77 L.Ed.2d 1453 6

Webb v. Webb, 451 U.S. 493, 101 S.Ct. 1889, 68 L.Ed.2d 392 (1981) 6

Street v. New York, 394 U.S. 576, 89 S.Ct. 1354, 22 L.Ed.2d 572 (1969). 6

Duncan v. Tennessee, 405 U.S. 127, 92 S.Ct. 785, 31 L.Ed.2d 86 (1972) 7

United States v. Thompson, 356 F.2d 216 (1965), Cert. Den. 384 U.S. 964, 86 S.Ct. 1591, 16 L.Ed.2d 675 (1966) 7

Urie v. Thompson, 337 U.S. 163, 69 S.Ct. 1018, 93 L.Ed 1282 (1949) 7

Fort Wayne Books, Inc. v. Indiana, 489 U.S. 46, 109 S.Ct. 916, 103 L.Ed.2d 34 (1989) 7

San Diego Gas & Electric Co. v. City of San Diego, 450 U.S. 621, 101 S.Ct. 1287, 67 L.Ed.2d 551 (1981) 8

Statutes:

Kentucky Revised Statute 431.005(4) 5

KRS 70.540 6

STATEMENT OF THE CASE

Respondent, the Commonwealth of Kentucky, rejects Petitioner's Statement of the Case and submits the following as more accurate and succinct:

On January 28, 1994, Jeffrey Roeder was walking beside Shepherdsville Road in Jefferson County, Kentucky when a motor vehicle left the road and struck him. Roeder's right leg was shattered and his body was propelled head-first through the vehicle's windshield. The vehicle stopped and the driver pulled Roeder back out through the windshield, laid him on the ground, then left the scene. When Jefferson County Police arrived on the scene minutes later, Roeder provided them with the license number of the vehicle which had struck him. A computer check revealed that the vehicle was registered to Petitioner at a Bullitt County, Kentucky address. A Jefferson County Police radio dispatcher called for assistance from Bullitt County authorities, and Officer James Gray of the Jefferson County Police proceeded to Petitioner's listed address. When Officer Gray arrived, he noticed Petitioner's car parked in the driveway with the motor warm and damage to the front of the car and the windshield consistent with Roeder's account of what had happened. As Officer Gray approached Petitioner's house, the front door opened and Petitioner exclaimed "I f_____ up, didn't I?" Gray then noticed that Petitioner appeared to be intoxicated because he smelled of alcohol, his speech was slurred, and he was unsteady on his feet. Petitioner was arrested and taken back to the scene of

the collision, where he was identified by the victim.

The Jefferson County Grand Jury returned an Indictment charging Petitioner with First Degree Assault, Operating a Motor Vehicle Under the Influence of Intoxicants, and Leaving the Scene of an Accident. Petitioner filed a motion to suppress "all observations of the defendant made by any and all police officers and breathalizer (sic) technicians; any statements made by the defendant subsequent to the illegal arrest; the results of any and all field sobriety tests as well as the law enforcement official's observations of the defendant when performing any field sobriety tests." After a hearing, the trial court sustained Petitioner's motion and ordered the evidence suppressed solely because "there is no grant [in the Kentucky Revised Statutes] of the power to arrest outside an officer's jurisdiction."

Because the post-arrest evidence was important to the prosecution's case, Respondent sought an interlocutory appeal of the trial court's order. On June 9, 1995, the Kentucky Court of Appeals rendered an opinion reversing the trial court's order and remanding the case for trial. On April 17, 1996, Petitioner's motion for discretionary review was denied by the Supreme Court of Kentucky.

On June 24, 1996, Petitioner filed another motion to suppress evidence in the trial court. He sought to have the court "suppress evidence obtained from warrantless search and seizure" of his residence. That issue was submitted to the trial court on July 2, 1996, but has yet to be ruled upon by the trial court.

Petitioner has not yet been convicted. A trial is scheduled for October 1, 1996. As of the filing of this Brief, Petitioner is free on bond to await his trial.

REASONS FOR DENYING THE WRIT

THE KENTUCKY COURT OF APPEALS' OPINION DID NOT DECIDE A FEDERAL QUESTION IN A WAY THAT CONFLICTS WITH APPLICABLE DECISIONS OF THIS COURT.

1. The state court has not ruled on the issue presented to this court by Petitioner.

The Fourth Amendment search and seizure question has been briefed but has not yet been decided by the state court. In his June 26, 1996, memorandum to the trial court, Petitioner asserted that the issue he asks this Court to review had not been addressed before. He asserted that the Kentucky "Court of Appeals opinion does not address the issue of the intrusion upon his residence without a warrant...[nor] the search and seizure of himself and his property without a warrant." Petitioner concluded that "this matter was not previously litigated in the Court of Appeals." In his petition filed only twenty days later, Petitioner argued to this Court that the previous ruling had decided a "warrantless search and seizure" question.

In its opinion rendered June 9, 1995, erroneously reproduced in Petitioner's appendix as being entered Aggust (sic) 9, 1994, the Kentucky Court of Appeals held that "the [trial] court erred by finding that appellee's arrest was illegal." Its four-page opinion did not mention search, seizure, or the Fourth Amendment to the United States Constitution. Instead, the opinion was limited to deciding whether Kentucky

Revised Statute (KRS) 431.005(4) authorizes a county police officer to make an arrest outside the county in which he serves.

In Kentucky's trial, intermediate appellate, and supreme courts Petitioner phrased the issue as one of statutory interpretation. In his "Motion to Suppress," Petitioner argued to the trial court that the state "statute does not authorize county police officers to exercise jurisdiction outside of their county." As a result of the Jefferson County Police Officer's arrest of Petitioner in Bullitt County, Petitioner asked the trial court to suppress "all evidence obtained from and through Mr. Hood subsequent to his illegal arrest." Petitioner specifically asserted to the trial court that there was "no need to discuss the probable cause to arrest issues." The trial court agreed with Petitioner, ruling that the applicable state statutes rendered Petitioner's arrest invalid based upon *Churchwell v. Commonwealth*, 843 S.W.2d 336 (1993).

Upon Respondent's interlocutory appeal, the trial court's order was reversed and the case was remanded for trial. In his brief to the Kentucky Court of Appeals, Petitioner argued that "The trial court correctly ruled that Jefferson County police officer Gray had no authority as a peace officer to arrest Mr. Hood in Bullitt County...[and] there was no basis for a private citizens arrest." The Court of Appeals rejected his argument and reversed the trial court.

Petitioner next filed a motion for discretionary review with the Kentucky Supreme Court. There, Petitioner asserted

that "[t]he question which Movant asks this court to review and answer involves the quantum of evidence in the possession of a private person sufficient to empower the private person to make an arrest pursuant to KRS 431.005(4)." The Kentucky Supreme Court denied his motion without comment. Thus, through three levels of state court, none have decided any issue with respect to the Fourth Amendment to the United States Constitution. This Court should not "review" a state court order based on an argument which was not made to the state court. *Illinois v. Gates*, 462 U.S. 213, 103 S. Ct. 2317, 76 L.Ed.2d 527 (1983), reh. Den. 463 U.S. 1237, 104 S. Ct. 33, 77 L.Ed.2d 1453. See also *Webb v. Webb*, 451 U.S. 493, 101 S.Ct. 1889, 68 L.Ed.2d 392 (1981); and *Street v. New York*, 394 U.S. 576, 89 S.Ct. 1354, 22 L.Ed.2d 572 (1969).

2. The opinion by the Kentucky Court of Appeals merely interpreted state statutes and did not involve a federal question.

The Kentucky Court of Appeals opinion expressly states that it involved "an appeal by the commonwealth from an order entered by the Jefferson Circuit Court adjudging [Petitioner's] arrest to be illegal...." The trial court had based its decision upon a Kentucky statute, KRS 70.540, ruling that county police officers had "jurisdiction coextensive with the whole county for which they are appointed." While the trial court found no exceptions, the Court of Appeals applied another state statute. It concluded that

KRS 431.005(4) authorized Petitioner's arrest and that the trial "court erred by finding that [Petitioner's] arrest was illegal." This court should not review judgements of state courts based upon interpretation of state statutes. *Duncan v. Tennessee*, 405 U.S. 127, 92 S.Ct. 785, 31 L.Ed.2d 86 (1972). Under either interpretation, no conflict arises with respect to federal authority. There is no constitutional right to be arrested by an officer in a particular uniform. See *United States v. Thompson*, 356 F.2d 216 (1965), Cert. Den. 384 U.S. 964, 86 S.Ct. 1591, 16 L.Ed.2d 675 (1966).

3. The state court's interlocutory opinion is not a final order.

The closing language of the Kentucky Court of Appeals Opinion expresses the effect of that Opinion: "For the reasons stated, the court's suppression order is reversed and this cause is remanded for further proceedings consistent with our views." Petitioner has not yet been convicted of anything, as his case is pending in the trial court. A case which has been remanded for trial should not be reviewed by this court. *Urie v. Thompson*, 337 U.S. 163, 69 S.Ct. 1018, 93 L.Ed 1282 (1949); see also *Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46, 109 S.Ct. 916, 103 L.Ed.2d 34 (1989).

After Petitioner is tried and convicted in state court, he will have at least two opportunities to appeal under Kentucky law. If the search and seizure issue is decided against him, his remedy is a direct appeal of the conviction.

Thus, his claim is subject to further proceedings before it is ripe, if at all, for review by this Court. *San Diego Gas & Electric Co. v. City of San Diego*, 450 U.S. 621, 101 S.Ct. 1287, 67 L.Ed.2d 551 (1981).

CONCLUSION

Respondent, the Commonwealth of Kentucky, respectfully requests this Court to deny the Petition for Writ of Certiorari to the Court of Appeals of Kentucky.

Respectfully Submitted,

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